

Montana Water Court  
PO Box 1389  
Bozeman, MT 59771-1389  
(406) 586-4364  
1-800-624-3270  
watercourt@mt.gov

**FILED**  
03/30/2023  
Sara Calkins  
CLERK  
Montana Water Court  
STATE OF MONTANA  
By: Vicki Heiser  
41C-6009-A-2022  
Ostrem, Eyvind  
5.00

IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
RUBY RIVER BASIN (41C)

\* \* \* \* \*

CLAIMANTS: Ray L. Shaw; ~~Lynette Slater; Mark Slater~~

**41C-6009-A-2022**  
41C 196770-00

**NOTICE OF FILING OF MASTER'S REPORT**

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

**MASTER'S REPORT**

On November 28, 2022, Claimant Ray Shaw filed a Verified Motion to Amend water right claim 41C 196770-00. The claim was consolidated into case 41C-6009-A-2022 to address the motion.

The Water Court ordered Mr. Shaw to publish notice of his motion pursuant to §85-2-233(6). Mr. Shaw filed his Notice of Filing of Affidavit of Publications on January 19, 2023, indicating the deadline to file responses or objections to his Motion to Amend was February 6, 2023. No responses or objections were filed with the Court. On February 14, 2023, Mr. Shaw filed his Notice of Matter at Issue, and Motion for Summary Judgment Amending 41C 196770-00. On March 22, 2023, an ownership update was processed to remove Lynette and Mark Slater as owners of the claim. The filings in this case are viewable on the Court's online case management platform, Full Court Enterprise.

### FINDINGS OF FACT

1. Water right claim 41C 196770-00 was filed November 12, 1981, by Earl and Viola English as an irrigation claim to 150 miners inches (3.75 CFS) of Bivens Creek water based on historical use. The Englishes claimed a 1947 priority date but attached an affidavit of John Simonsen suggesting irrigation had taken place since at least 1912.

2. Ray Shaw, the current claimant of the water right, filed his Verified Motion to Amend to correct the claim's priority date, type of historical right, and flow rate to match a right decreed to his predecessors in Madison County District Court Case 1685 on January 8, 1921 (*Shaw v. Noble*). Mr. Shaw also asks that the place of use be refined to address an issue remark on the claim.

3. Case 1685 decreed 5 CFS of Bivens Creek water to Peter J. Simonsen, John K. Simonsen, Martin Simonsen, and Niels C. Simonsen (collectively the Simonsen Brothers) with an April 1, 1879 priority date for use on their lands. On December 5, 1921, John, Martin, Niels, and Niels' wife Kristine Simonsen, executed a warranty deed transferring certain lands, including the place of use for claim 41C 196770-00, to Peter Simonsen. The transfer included all "right, title, claim and interest in and to all decreed and undecreed waters from Bivens Creek . . . particularly all waters decreed in that certain decree in that certain action entitled "Thomas L. Shaw, et al. vs. D. A. Noble, et al," being Docket No 1658 District Court, Madison County, Montana."

4. Upon the Water Court's review, it does not appear any other water right in Basin 41C is linked to the April 1, 1879 Simonsen right in Case 1685.

5. During the Department of Natural Resources and Conservation's (DNRC's) reexamination process, the DNRC placed the following issue remark on the claim, raising legal or factual issues:

THIS CLAIM PRESENTS ISSUES OF FACT AND LAW THAT MAY BE ADDRESSED AT THE OBJECTION STAGE. IT APPEARS THAT 80.0 ACRES ARE ACTUALLY IRRIGATED AND PROBLEMS COULD EXIST WITH FLOW RATE AND VOLUME. TO ASSURE THE ORDERLY ADMINISTRATION OF WATER RIGHTS, THE WATER COURTS WILL SET A HEARING TO DETERMINE THESE ISSUES IF NO OBJECTIONS ARE MADE.

Ray Shaw's Motion to Amend indicates Mr. Shaw agrees that only 80 acres are irrigated. He included a map of those irrigated acres and requests the Court refine the place of use accordingly and remove the issue remark. The issue remark does not identify any existing problems with the flow rate and volume, and water users will have the opportunity to object to the claim in the Basin 41C Preliminary Decree and request a hearing if they believe problems exist.

**Priority Date:** ~~December 31, 1947~~ **April 1, 1879**

**Type of Historical Right:** ~~Use~~ **Decreed**

**Maximum Flow Rate:** ~~3.41 CFS~~ **5.00 CFS**

**Maximum Acres:** ~~90.00~~ **80.00**

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	<del>30.00</del> <b><u>24.00</u></b>		SESE	19	5S	4W	Madison
2	<del>28.00</del> <b><u>24.00</u></b>		NWSW	20	5S	4W	Madison
3	<del>32.00</del> <b><u>80.00</u></b>		NESE	19	5S	4W	Madison

#### PRINCIPLES OF LAW

1. A properly filed claim of an existing right or an amended claim of existing right is prima facie proof of its content. § 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R.

2. The Montana Water Court has the authority to resolve issue remarks when the claim file and information available to the Court provide a sufficient basis to do so. § 85-2-248(3), MCA.

### CONCLUSIONS OF LAW

1. The Findings of Fact above are supported by a preponderance of the evidence. The claim should be modified as described in Finding of Fact No. 5, above. These modifications resolve the issue remark on the claim and address Mr. Shaw's Motion to Amend and Motion for Summary Judgment.

### RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends the claim be modified as described above and the issue remark be removed from the claim.

A map of the claim's corrected place of use and a post-decree abstract of the water right claim reflecting the recommended changes is attached to this Report.

### **ELECTRONICALLY SIGNED AND DATED BELOW.**

#### **Service via USPS Mail**

##### **Last Order:**

*Lynette Slater*

*Mark Slater*

*1040 Nelson Rd*

*Bozeman, MT 59718-8730*

#### **Service via Electronic Mail**

Ryan McLane

William P Driscoll

FRANZ & DRISCOLL, PLLP

PO Box 1155

Helena, MT 59624-1155

(406) 442-0005

Ryan@franzdriscoll.com

wpd@franzdriscoll.com

Office@franzdriscoll.com

### **NOTICE: Service List & Caption Updated 3.14.23**

\\JUDGALH2OSRV\Data\vol\Share\WC-BASIN FOLDERS\41C TPD\CASES\41C-6009-A-2022\EO MR (MTA, Noticed, Decreed) 3.14.23 VH.docx

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
RUBY RIVER  
BASIN 41C**

**Water Right Number:** 41C 196770-00 STATEMENT OF CLAIM

**Version:** 2 -- POST DECREE

**Status:** ACTIVE

**Owners:** RAY L SHAW  
251 BIVENS CREEK RD  
SHERIDAN, MT 59749

**Priority Date:** APRIL 1, 1879

**Type of Historical Right:** DECREED

**Purpose (use):** IRRIGATION

**Irrigation Type:** FLOOD

**Flow Rate:** 5.00 CFS

**Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

**Climatic Area:** 4 - MODERATELY LOW

**Maximum Acres:** 80.00

**Source Name:** BIVENS CREEK

**Source Type:** SURFACE WATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SENWSW	20	5S	4W	MADISON
<b>Period of Diversion:</b>	MAY 1 TO NOVEMBER 4					
<b>Diversion Means:</b>	HEADGATE					
2		SWNESW	20	5S	4W	MADISON
<b>Period of Diversion:</b>	MAY 1 TO NOVEMBER 4					
<b>Diversion Means:</b>	HEADGATE					
3		SWSWSW	20	5S	4W	MADISON
<b>Period of Diversion:</b>	MAY 1 TO NOVEMBER 4					
<b>Diversion Means:</b>	HEADGATE					
4		SWNWSE	20	5S	4W	MADISON
<b>Period of Diversion:</b>	MAY 1 TO NOVEMBER 4					
<b>Diversion Means:</b>	HEADGATE					

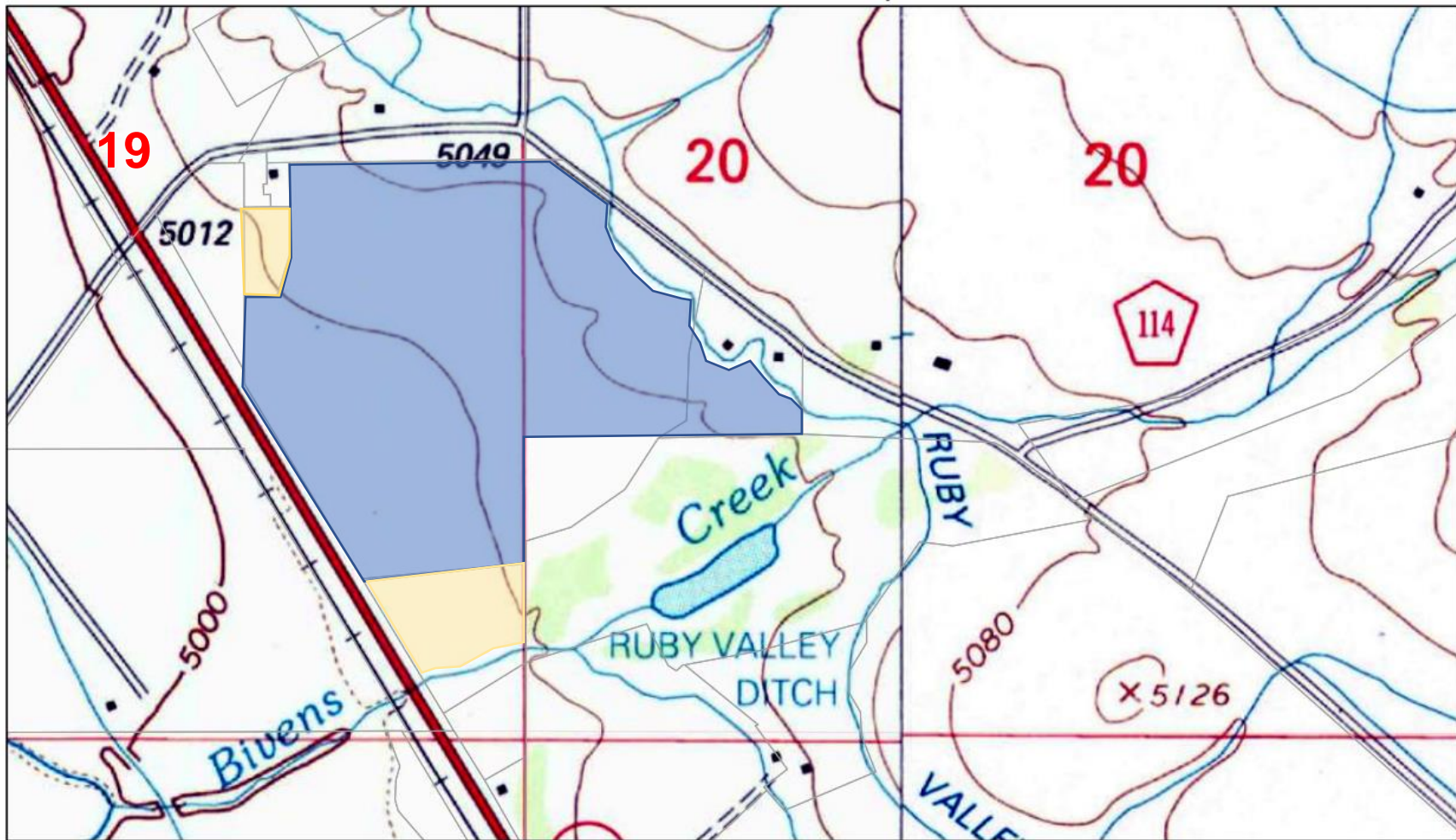
**Period of Use:** MAY 1 TO NOVEMBER 4



**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	24.00		SESE	19	5S	4W	MADISON
2	24.00		NWSW	20	5S	4W	MADISON

3	32.00	NESE	19	5S	4W	MADISON
<b>Total:</b>	<u>80.00</u>					

## PLACE OF USE MAP – 41C 196770-00



-  Remaining Place of Use
-  Severed Acres

All of T5S, R4W, Madison Co.

